JR-2024-LON-000457

In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

In the matter of an application for Judicial Review

The King on the application of
HS & Others

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Kamara

On the application for judicial review of the respondent's decisions of 9 February 2024 and 15 February 2024 refusing the applicants' requests for biometric excuse or predetermination of their entry clearance applications made on 21 December 2023

AND UPON hearing Ms C Kilroy KC and Ms M Knorr, Counsel, instructed by Migrants' Law Project at Asylum Aid, for the applicants and Mr A Payne KC and Mr O Rhys James, Counsel, instructed by the Government Legal Department, for the respondent at a hearing held at Field House on 5 March 2024.

AND UPON the Tribunal on 5 March 2024 making an Order granting permission and allowing the Applicants' judicial review on Grounds 1 and 2 (with respect to Article 8 ECHR), reserving the decision in relation to the further grounds with reasons to follow, and granting remedies and costs as set out in the 5 March 2024 Order.

AND UPON the Tribunal and High Court making a further orders on 8 March 2024 to enforce the 5 March 2024 order.

It is FURTHER ORDERED that:-

1. Permission is refused on ground 3 for the reasons set out in the judgment.
2. The costs order made on 5 March 2024 includes all reasonable costs to date.
3. The applicants' legally aided costs be subject to a detailed assessment.
4. The Respondent's application for permission to appeal is refused on all grounds.

Signed: T Kamara

Upper Tribunal Judge Kamara

Dated: **26 April 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 26/04/2024

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2024-LON-000457

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

26 April 2024

Before:

UPPER TRIBUNAL JUDGE KAMARA

- -

Between:

THE KING
on the application of

HS, SS, GS*, QS*, SAS* MS*
(*children by their litigation friend HS)

Applicant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms C Kilroy KC and Ms M Knorr
(instructed by the Migrant's Law Project at Asylum Aid), for the applicants

Mr A Payne KC and Mr O Rhys James
(instructed by the Government Legal Department) for the respondent

Hearing date: 5 March 2024

- -

J U D G M E N T

- -

No-one shall publish or reveal any information, including the name or address of the Applicants or their Sponsors, likely to lead members of the public to identify the Applicants or their Sponsors. Failure to comply with this order could amount to a contempt of court.

Judge Kamara:

1. The applicants challenge a decision of the respondent dated 9 February 2024 refusing to decide A2-6's entry clearance applications as well as refusing to excuse the prior provision of biometrics. Also challenged is a decision dated 15 February 2024 which maintained the earlier decision.

Background

2. The first applicant, HS (A1) is a Palestinian national and recognised refugee in the United Kingdom. SS (A2) is his wife following their marriage which took place in Gaza in 2008. The remaining applicants (A3-6) are the minor children of HS and SS who are aged between 13 and 6 years old. As a result of the war which followed the 7 October 2023 attacks, A2-6 are displaced from their home in North Gaza and are living in dire circumstances in Rafah.

3. A1 arrived in the United Kingdom on 10 July 2021 and was granted refugee status on 6 November 2023 on the basis that he was at risk from Hamas.

4. On 21 December 2023 A2-A6 (hereinafter referred to as the applicants) applied for entry clearance under Refugee Family Reunion. Accompanying representations requested that the requirement to provide biometrics be waived, referred to as 'biometric excuse.' In the alternative, it was requested that that an in-principle decision be made, referred to as 'pre-determination,' subject to the later provision of biometrics.

5. There were earlier proceedings which challenged the respondent's decision dated 12 January 2024 to decline to prioritise the request for biometric deferral (JR-2024-LON-000143) and that decision was subsequently withdrawn.

The Grounds

6. Firstly, the decisions were said to be irrational, in that the only rational decision said to be open to the respondent was to excuse the taking of biometrics or to pre-determine the entry clearance applications.

7. Secondly, it was contended that the decisions breached the applicant's rights under Articles 3 and 8 ECHR. Reference was made to there being a positive obligation to admit the applicants and that the continued separation of the family unit amounted to inhuman and degrading treatment which breached A1's rights under Article 3.

8. Thirdly, it is submitted that the version of the policy entitled 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications),' (referred to as the Unsafe Journey Policy) dated 3 May 2023, in place at the time of the applications for entry clearance, is unlawful as is the second version of the said policy, updated on 8 February 2024.

9. The applicants seek the following remedies, reproduced from [51] of the grounds:

(1) An order quashing the SSHD's decisions of 9 February and 15 February 2024;
(2) An order declaring that the SSHD's failure to decide A2-6's entry clearance applications and to defer biometrics breaches Articles 3 and 8 ECHR.
(3) A declaration that the Unsafe Journey Policy is unlawful for the reasons given in the judgment. 9 See also updated version of Biometric Guidance (V.10), p.10 [AB/43/p.1229] which is similarly unlawful. 22
(4) An order that the SSHD urgently take a substantive decision on A2-6's entry clearance applications within 2 working days (or other timeframe considered appropriate by the Tribunal).
(5) Alternatively, an order that the SSHD (i) take a new decision within 24 hours (or other timeframe considered appropriate by the Tribunal) on whether to excuse or defer biometrics in accordance with the findings in the Judgment and any declarations, and (ii) take a substantive decision on A2-6's applications for entry clearance within 2 working days thereafter (or other timeframe considered appropriate by the Tribunal).
(6) Damages
(7) Further or other relief deemed appropriate by the Court;
(8) Costs.

10. The respondent's position, in summary, is that the decisions were lawful and properly reasoned, that Article 8 was lawfully addressed, no breach of A1's Article 3 rights had been established and that the Unsafe Journeys Policy was lawful. The overarching point being that there was no 'realistic prospect' of the applicants being able to leave Gaza and travel to a Visa Application Centre (VAC) or to the United Kingdom.

11. Following an application for urgent relief made on 27 February 2024, on the same date, Upper Tribunal Judge Pitt made the following order:

> The application is adjourned to be listed as a "rolled up hearing", on notice to the respondent. If permission to apply for judicial review is granted at that hearing, the Upper Tribunal will proceed immediately to determine the substantive claim.

<u>The hearing</u>

12. A preliminary matter to be determined at the substantive hearing was the application by the respondent for an extension of time to rely upon the witness statement of John Allen. That application was granted, there being no objection put on behalf of the applicants. The applicants sought and obtained permission to rely upon a further witness statement of Ms Solopova in response to that of Mr Allen.

13. Otherwise, Ms Kilroy confirmed that the applicants would be seeking a declaration from the Upper Tribunal with reasons to be given later.

14. Detailed submissions were made on behalf of the applicants and the respondent which are not replicated here but which have been considered fully in arriving at the outcome in these proceedings.

15. At the end of the hearing, the parties were informed that permission was granted in respect of the first ground and partially in relation to the second ground, in respect of Article 8 only. The substantive judicial review was granted on the same basis and the decisions dated 9

February 2024 and 15 February 2024 were quashed. A decision on the remainder of the grounds was reserved. A declaration to that effect was made immediately following the hearing, with the respondent ordered to decide whether to grant visas on each of the applicants' entry clearance applications by 4pm on Thursday 7 March 2024.

Legal and policy framework

16. The requirement to provide fingerprints and photographs, (enrol biometric information) when making an application for leave to enter or remain in the UK is governed by the Immigration (Biometric Registration) Regulations 2008 ["the 2008 Regulations"]. The procedure normally followed is that an applicant for entry clearance will enrol their biometrics at the same time as submitting the entry clearance application. The Secretary of State normally requires that biometric enrolment takes place at a VAC. Regulation 5 contains a discretionary power to vary this prior biometric enrolment process. Regulation 8 states, inter alia, that "enrolment may occur after an application for entry clearance has been substantively considered."

17. Version 9 of the Biometric enrolment: policy guidance of 24 October 2023, at page 6, addresses the importance of biometrics to identify those who represent a public protection threat or use multiple identities. In relation to the excusal of biometrics, the policy states as follows:

> Individuals who are required to apply for a visa or a biometric immigration document must, in most circumstances, enrol their biometrics as part of their application at a VAC or other location authorised by the Secretary of State, unless they are excused, or officials have decided to use previously enrolled biometrics. Officials must, in most circumstances, not consider an application until checks against the individual's biometrics are completed, except where the individual is excused from having to enrol their biometrics before the application is decided. This is to ensure officials can confirm the identity and suitability of the individual before considering whether they are eligible for the leave or status being sought.

18. The guidance, at page 17, also states:

> Officials will not normally defer or waive the requirement to provide biometric information, unless there are circumstances that are so compelling as to make them exceptional which are beyond the control of the individual.

19. Version 1 of the policy 'Unable to travel to a Visa Application Centre to enrol biometrics (overseas applications)' dated 3 May 2023, otherwise referred to as the Unsafe Journeys Guidance, describes the respondent's policy on processing requests from individuals for either predetermination or biometric excuse where it is said to be too unsafe for travel to a VAC to be undertaken.

20. The Unsafe Journeys Guidance sets out the four criteria to be met for a successful outcome for either type of request. Further explanatory detail appears later in the said Guidance.

1. Individuals must satisfy a decision maker about their identity to a reasonable degree of certainty before coming to the UK.

2. They **must** provide evidence they need to make an urgent journey to a VAC that would be particularly unsafe for them based on the current situation within the area they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics, and they cannot delay their journey until later or use alternative routes.

3. They **must** demonstrate their circumstances are so compelling as to make them exceptional. which go beyond simply joining relatives who are living in the UK, for example, their UK based sponsor requires full-time care and there are no other viable alternatives to meet the sponsor's or their young children's needs.

4. They **must** confirm they are able to travel to any VAC if they want their application to be predetermined, or where they are requesting decision makers to excuse them from the requirement to attend a VAC to enrol their biometrics, they need to explain why they cannot attend any VAC, but are able to travel to the UK.

21. In relation to the second criteria, of unsafe journey, page 17 of the Guidance includes the following explanation.

"Decision makers **must** not normally agree to predetermine an application or excuse the requirement to attend a VAC just because individuals consider their journey to the VAC is unsafe. Individuals **must** provide evidence they:

- face dangers beyond the current situation that exist in area where they are located and along the route where they would need to travel to reach a VAC to enrol their biometrics and there are no alternative routes they could use
- personally face an immediate and real risk of significant injury or harm because of their personal circumstances, if they attempt to travel to any VAC
- have an overriding need to travel urgently and cannot delay their journey
- are in an area of ongoing conflict or the area has become unsafe following a catastrophic natural disaster or where travelling to any VAC is through an area of conflict and there are no alternative options available to them
- needed to travel to an unsafe location, when they could have simply travelled to another place to provide their biometric information

Other factors decision makers **must** also have regard to when making that assessment include:

- vulnerabilities such as the individual as a lone female, they are frail or they are a young child with demonstrable evidence there is no protection available to them either by relatives, governmental or Non-Governmental Organisation (NGO) to assist them to travel to any VAC
- mental or physical health issues with demonstrable evidence this prevents them from travelling to any VAC but **not** travelling to the UK

decision makers must consult a range of data sources when undertaking an assessment of the journey the individuals need to make to be able to attend any VAC, which may include NGO, open-source information, foreign government assessments and other government departments when considering the levels of risk the individual may face attempting to travel to a VAC.

22. In respect of the third criterion, page 19 of the guidance addresses how the circumstances of the applicants and United Kingdom sponsor are assessed and also includes the following statement.

> In most circumstances, decision makers should not regard individuals' circumstances as being compelling unless they are applying to join family who are sponsoring them to join them in the UK. In addition, the family members they are seeking to join in the UK have protection status to stay, are settled in the UK or are British citizens and the individual has an urgent need to travel to the UK.

23. Version 2 of the same policy was included in the authorities' bundle but for reasons which will become obvious below, there is no need to explore this in any detail.

24. The applicants also rely on an FCDO policy as expressed in a letter to Wilsons LLP Solicitors on 15 December 2023 in the following terms;

> As of 14 December, the FCDO can extend our assistance in leaving Gaza to Palestinians who have strong links to the UK by having either a spouse or children under 18 currently living in the UK and who currently hold valid permission to enter or remain for longer than 6 months. Ultimately, as previously explained, decisions as to who can leave Gaza and enter Egypt remain with the Israeli and Egyptian authorities.

Discussion

25. The context to these claims is well known. Indeed, Mr Payne prefaced his submissions by emphasising that the respondent was conscious as to the intense suffering in Gaza and was sympathetic as to the applicants' circumstances. Given that approach it suffices to refer to the applicant's evidence and the background country material briefly. For instance, Save the Children report that over 10,000 children in Gaza have been killed, there is a risk of famine, and the health system has collapsed. It is not in dispute that the lives of A2-A6 are at risk, due to airstrikes, a lack of food, water, and access to medical treatment.

26. Aside from the general appalling situation in Gaza, the applicants are facing additional challenges. The applicants' witness statements show that the minor applicants have lost weight and are often too weak to help their mother carry water or firewood. In addition, A5 suffers from urinary incontinence and there is an absence of washing or laundry facilities. A5 and A6 have contracted hepatitis A, A3 suffers from asthma that is triggered by smoke and the cold and he cannot access treatment. A4 was struck by a motor vehicle, fracturing his leg, is in pain and unable to walk.

27. According to the report from A1's therapist at Freedom from Torture, the family separation is causing a 'rapid and extreme decline' in his already poor mental health. A1's fear that his wife and children will die has led to suicidal thoughts. It is worth noting that even prior to the recent events in Gaza, A1 was diagnosed with Post Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD).

Ground one

28. The argument put on behalf of the applicants is that no rational decision-maker would refuse to either to grant entry clearance or to pre-determine their entry clearance applications, given their circumstances.

29. The usual process is that the applicants are required to provide biometrics at a VAC before their applications for entry clearance are determined unless their circumstances meet the criteria for biometric deferral or predetermination set out in the Unsafe Journeys Policy. If the criteria are met, the applications can be determined in principle before their biometrics are taken at a VAC or the provision of biometrics can be deferred until arrival in the UK.

30. In the representations which accompanied the entry clearance applications sent on behalf of the applicants on 21 December 2023 it was requested that either entry clearance should be granted without provisions of biometrics until arrival in the United Kingdom or that, alternatively, the applicants should be given a positive predetermination of their applications which would 'allow them to negotiate exit via Rafah crossing including in accordance with the FCDO policy, and provide biometrics in Egypt prior to travelling on to the UK.'

31. In the decision letter dated 9 February 2024, the request for biometric excuse was refused because the applicants had 'not established their identity to a reasonable degree of certainty.' At that stage the applicants held no passports and the minor applicants' photographs were said not to have been included on the photocopied national identity card of A2. No other reason was given for denying the applicants biometric excuse. In relation to the request for pre-determination, the respondent contended that the four criteria in the Unsafe Journey Policy had not been met.

32. By the time of the 15 February 2024 decision letter, the applicants had obtained passports and photocopies were provided to the respondent. The respondent raised concerns regarding the lack of access to the original passports and commented that the other three criteria under the Unsafe Journey Policy had not been addressed further.

33. The overriding test set out in the 2008 Regulations for excusing or deferring the provision of biometrics, that 'there are circumstances that are so compelling as to make them exceptional which are beyond the control of the individual' has been met in the applicants' cases. No reasonable decision-maker could conclude otherwise on the facts of their cases, given the risk to their lives, their personal characteristics as well as the lack of any significant risk to the public interest from deferring the provision of biometrics. Neither decision addresses this overriding issue. In addition, the respondent was mistaken in stating that there was no photograph on A2's identity document. The applicants' original passports were available at the hearing for inspection and their solicitor has also offered, in writing, to send them to a location of the respondent's choosing for inspection. The objections to the scanned

copies of the passports are unfounded given the Unsafe Journey policy states at page 13 that high-quality scanned images of documents can be authenticated.

34. There is no rational basis for concluding that the public interest in insisting on biometrics prior to the determination of the applicants' entry clearance applications outweighs the interference with their rights in failing to decide their applications. The respondent accepts the applicants' identities, they have valid passports that can be physically inspected, and they are willing give their biometrics upon collecting their visas in Cairo. There is no apparent risk of either fraud or to the security of the United Kingdom in this case.

35. Turning to the refusal to pre-determine the claim, it has been established that the applicants meet the four criteria in the Unsafe Journeys Policy and in these circumstances the decision was Wednesbury unreasonable.

36. As indicated above, the applicants have satisfied the respondent as to their identity to a reasonable degree of certainty.

37. Criterion two focuses on the journey to a VAC being proven to be particularly unsafe for the applicants. The respondent argues that there is an absence of evidence that the journey to a VAC itself is unsafe for the applicants. Paragraph 24 of the first decision letter reaches the following conclusion on this matter:

> The situation your clients have outlined in respect of their circumstances in Gaza, whilst deserving of great sympathy, are similar to the very difficult circumstances faced by the wider population of that territory and do not attest to a particular circumstance that would mean that your clients as individuals would face an Unsafe Journey in comparison to other people who are currently living on the territory. Whilst the situation in Gaza is undoubtedly very difficult, I am not satisfied that your clients have demonstrated that they are at personal risk, need to make an urgent journey, or that any such journey would be particularly unsafe for them over and above other persons currently living on the territory.

38. The Unsafe Journeys guidance, in stating the type of evidence which must be provided to establish that a journey is unsafe makes specific reference to a situation where 'the way of travelling to any VAC is through an area of conflict and there are no alternative options available to them.' In addition, there is mention of additional risks faced by lone women and minor children.

39. The respondent argues that it is the general situation in Gaza which is unsafe rather than the journey to a VAC; that the applicants' issue was in reality their inability to access a VAC and that they had not shown that they would be targeted. Indeed, paragraph 24 of the first decision letter stated as follows;

> The situation your clients have outlined in respect of their circumstances in Gaza, whilst deserving of great sympathy, are similar to the very difficult circumstances faced by the wider population of that territory and do not attest to a particular circumstance that would mean that your clients as individuals

would face an Unsafe Journey in comparison to other people who are currently living on the territory. Whilst the situation in Gaza is undoubtedly very difficult, I am not satisfied that your clients have demonstrated that they are at personal risk, need to make an urgent journey, or that any such journey would be particularly unsafe for them over and above other persons currently living on the territory.

40. In coming to the above conclusion and in searching for evidence that the applicants' circumstances were worse than others in Gaza, the respondent did not consider whether the applicants were in fact at risk of harm owing to their personal circumstances. The Guidance refers to the risk arising from an area of ongoing conflict as well as that concerning lone women and children, yet there is no engagement with these parts of the guidance in the decisions under challenge.

41. The Unsafe Journeys guidance requirement of evidence that a person faces 'dangers beyond the current situation that exist in area where they are located and along the route they would need to travel,' is unexplained and effectively amounts to a limitation that only applicants with rare and unusual circumstances can meet, applying *R (on the application of MRS and FS) v Entry Clearance Officer (Biometrics – entry clearance – Article 8)* [2023] UKUT 00085 (IAC).

42. Mr Payne made a floodgates-type argument, suggesting that everyone in Gaza could meet the four criteria if the applicants' succeeded, relying on *Hesham Ali* [2016] UKSC 6. This approach is rejected, as the respondent's requirement for the applicants' circumstances to be exceptional compared to others is inconsistent with *Hesham Ali.* The point regarding exceptionality, is that an exception is sought for the waiver of the general requirement to give biometrics in advance of an application for entry clearance. Furthermore, the pool of potential applicants who could apply for a waiver of biometrics would be limited to those with a sufficiently close family member in the United Kingdom and where Article 8 is engaged. There was no evidence produced on behalf of the respondent to indicate that significant numbers of people fell into that category.

43. For these reasons and given that the applicants meet the remainder of the bullet points under the second criterion it was irrational and unreasonable for the respondent to conclude that this criterion was unmet.

44. Turning to the third criterion, that of compelling circumstances, in the first decision letter, the respondent referred to the representations regarding the applicants' personal circumstances and made the following comment at paragraph 26:

> Having considered this information and whilst recognising how difficult the position is for all persons in Gaza, including young children, I do not consider that the evidence provided indicates that your clients are distinguishably vulnerable, whether having regard to their particular circumstances or by comparing their circumstances to others living in Gaza.

45. Again, as indicated above, there is no requirement in the Unsafe Journeys guidance or as a matter of principle that the applicants'

situation must be distinguishable or worse than others in Gaza for the circumstances to be exceptional. Furthermore, there was no proper detailed consideration of the evidence before him of the individual circumstances of the applicants, including the sponsor in the United Kingdom. Albeit there was no challenge to the individual risks faced by the applicants as set out in those representations.

46. The respondent's conclusion that the sponsor can 'access medical care and support whilst in the UK,' was dismissive and flew in the face of medical evidence that there was no effective treatment and that there was a risk of suicide flowing from the continued family separation. The evidence provided in support of the sponsor's circumstances was glossed over despite it being a relevant consideration under the third criteria. In paragraph 28 of the decision letter, there is a reference to others with family members in Gaza being caused 'distress and anxiety.' As indicated elsewhere, the Guidance imposes no requirement that a sponsor's circumstances must be distinguishable from other sponsors.

47. The failure to consider the sponsor's mental health in any detail, to require the sponsor's circumstances to be worse than others with relatives in Gaza and to conclude that there were no compelling and exceptional circumstances was irrational.

48. The circumstances of the minor applicants are that they are displaced to Rafah, which is facing an imminent ground invasion, they lack food, potable water and have serious health issues (hepatitis A and injuries from a motor vehicle accident). The respondent's conclusion that they have not shown that they are personally at risk is perverse and one which could not have been reached by a reasonable decision-maker. There is no support for this approach in the Unsafe Journey Policy.

49. As to the fourth criterion, Mr Payne's main submission was that the applicants were simply unable to travel to a VAC because of the difficulties in crossing the border between Gaza and Egypt.

50. It was argued on the applicants' behalf that there were three possible routes through which they could exit Gaza with a positive pre-determination decision. Firstly, with FCDO assistance using their residual discretion. Secondly, the potential to negotiate exit directly with the authorities in Egypt or with third countries facilitating evacuations and thirdly by means of a 'co-ordination payment' (bribe). The applicants rely on a wealth of evidence including that set out in witness statements from the solicitor with conduct of their cases which address why a predetermination decision could assist the applicants in exiting Gaza.

51. Mr Payne characterised the evidence referred to in the solicitor's witness statements as being of limited assistance based on hearsay and lacking evidence. Being careful to say that he was not impugning that evidence, he argued that the solicitor was not an expert and much of the evidence came from an individual whose sources were not apparent. Mr Payne argued that there was no evidence that the applicants would need predetermination or a visa to leave or that either document would assist in obtaining exit via bribery. Nor was there evidence they would use

bribery or have the funds to do so. He added that there was no evidence that the applicants had approached the FCDO for inclusion on the referral list and no example of where a third state had assisted people to leave Gaza.

52. The difficulty for the respondent is that there was no criticism of the solicitor's first witness statement in the decisions under challenge nor in the summary grounds of defence. Furthermore, the source of much of the solicitor's evidence was Ms Galili of 'Gisha,' an organisation the respondent quotes repeatedly in the Home Office report on Occupied Palestinian Territories. The evidence of Gisha is particularly relevant to the issue of reasonable prospect of exit via bribery. The respondent has produced no contradictory evidence.

53. It is considered that the applicants have demonstrated that there was a reasonable prospect of them being able to travel to the VAC in Cairo and that the respondent was wrong to state that they would be unable to do so. While the evidence of alternative exit routes was not ideal, it is not reasonable to expect a higher quality of evidence in the present rapidly changing circumstances and where one such route is irregular. The respondent was unable to establish why a positive predetermination decision would not assist the applicants in leaving Gaza.

54. The applicants' evidence indicates that the FCDO have previously exercised its discretion and assisted immediate family members of a United Kingdom resident where the requirement for a visa for over six months was not met. In another case involving the the spouse of a recognised refugee UK, the FCDO stated that they could reconsider whether to offer assistance if a positive pre-determination was subsequently issued.

55. The respondent failed to properly consider other potential routes out of Gaza which are improved with a positive predetermination (such as through 'coordination payments' or assistance of a third country. The respondent's conclusion that the FCDO would 'certainly' refuse to include the applicants on the evacuation list, even if they had a positive predetermination that they are entitled to visas of six months or more, despite having strong relationship links, is irrational.

Ground 2 – Article 8

56. The applicants argue that the respondent's refusal to consider the entry clearance applications either by biometric excusal or pre-determination amounts to a breach of the respondent's obligations under Article 8 ECHR.

57. The respondent is required to exercise the discretion to require biometrics compatibly with his obligations under Article 8. This is a straightforward case in that the applicants are a family unit of parents and children and there is no dispute that they are related and that they have a family life. In addition, the applicants meet the requirements for a grant of entry clearance under Appendix-FRP as A1's pre-flight wife and minor children. There is, therefore, a positive obligation to provide

access to a fair procedure to enable the applicants to travel to the United Kingdom for the purpose of family reunion.

58. The respondent argues that Article 8 is not engaged because the applicants are outside of the United Kingdom. That argument is not tenable, applying *Gudanaviciene* [2014] EWCA Civ 1622 at {69}

> Article 8 is frequently engaged in immigration decisions. The procedural protections inherent in article 8 are necessary in order to ensure that article 8 rights are practical and effective. The necessity for this is at least as important in immigration cases as in any other cases.

59. The respondent further contends that there is no reasonable prospect of the applicants travelling to a VAC or the United Kingdom. Indeed, the first decision letter says at [30];

> Since your clients have not established any reasonable prospect of leaving Gaza it is not accepted that the decision not to permit a biometric excuse or pre-determine the application interferes with the Article 8 rights of the family member in the UK.

60. The respondent's view is that any interference with the applicants' family life is not owing to the refusal to grant predetermination or biometric excuse and therefore Article 8 has not been breached. Given the findings above under the first ground regarding the availability of methods of exiting Gaza via Rafah, the respondent can no longer rely upon the argument that the applicants would find it impossible to depart even if biometric deferral or predetermination had been granted.

61. The failure to decide the entry clearance applications by either excusing or deferring biometrics to a later stage of the entry clearance process, prevents the applicants from making an effective application for family reunion. Since the applicants' identities have been established to a high degree of certainty and they are entitled to family reunion, the respondent has not complied with his obligation to facilitate access to an expeditious family reunification procedure. This has the effect of preventing the resumption of family life in the country of refuge.

62. The requirement for biometric information to be enrolled before an entry clearance application is in accordance with the law and in pursuit of a legitimate aim, principally that of securing effective immigration control and protecting the national security of the United Kingdom.

63. It is uncontroversial that the public interest in obtaining biometric information goes to confirmation of identity, the identification of those who are criminals, those who pose a national security threat or threaten the integrity of immigration control.

64. In assessing the proportionality of the decisions in this case there must be a balancing of the public interest concerns with the circumstances of the applicants. This aspect was addressed in the first decision letter at [32].

> Biometrics, in the form of a facial image and fingerprints, underpin the UK's immigration system to support identity assurance and suitability checks on

> foreign nationals who are subject to immigration control. They provide a unique capability which enables us to conduct comprehensive checks to prevent leave being granted to those who pose a threat to national security or are likely to breach our laws. These checks are particularly important in relation to protecting the UK from the threat of terrorism. Gaza, alongside Israel and the wider Occupied Territories, is assessed by the FCDO as 'very likely' to continue to see terrorist attacks, including by individuals acting alone. It is administratively governed by Hamas, a proscribed terrorist group under the Terrorism Act 2000, who view British nationals as legitimate targets…

65. The respondent also relies upon the witness statement of John Allen dated 4 March 2024. The said statement emphasises the importance of biometric checks for applicants from Gaza, Israel and the wider Occupied Territories given the FCDO assessment that terrorist attacks are 'very likely,' including by individuals acting alone. Mention is also made of women and children having been used to carry suicide vests 'several years ago.'

66. John Allen's report raised several concerns including the spectre of a third-party accessing an in-principle decision letter to attempt to travel to the United Kingdom; that a third country would expect the United Kingdom to 'take' a person regardless of the outcome of biometrics or multiple applications being made. These are all understandable concerns, albeit the prospect of a third party intercepting a decision letter and using it to enter the United Kingdom somewhat undermines the respondent's submission that such letters do not facilitate departure from Gaza.

67. In relation to security concerns, it is relevant to the proportionality assessment that all the applicants have undergone and cleared checks, including against watchlists as can be seen from the disclosure included in the applicants' bundle at page 766-786 onwards. Furthermore, the respondent's Gaza Evacuation Update dated 14 October 2023 emphasises the robust border regime at Rafah. Based on that evidence, it appears most unlikely that a Hamas operative would be able to clear checks with both Israeli and Egyptian authorities.

68. As for the concern as to the United Kingdom being under pressure to take people who subsequently fail biometrics in Egypt, the same update states that the British Embassy in Cairo have not been asked to give any such assurance and further states that this does not appear to be a significant issue.

69. *JZ* [2022] EWHC 771 (Admin) concerned an application for predetermination of applications for entry clearance by a family made in Afghanistan owing to the dangerous nature of the journey to Pakistan to give their biometric information. Similar security concerns were raised and Lieven J found as follows.

> 40. I note that the Defendant has accepted in some instances, such as the evacuation under Operating Pitting and the present Ukrainian crisis, that it may be appropriate to allow individuals to only provide biometric information once they enter the UK. Such general waivers are plainly ones for the discretion of the Defendant. Mr Allen makes the point which I accept, that the

fact someone is coming from a conflict zone is not itself a good ground for a waiver.

41. Ms Giovannetti also argues that it is of great importance to provide biometric data before an application is processed. She says that this is to ensure that the person who submits the application is the person they say they are and ensures that they cannot subsequently submit a further application but in a different name. As a generality I entirely accept that this is a good reason.

42. In the present case there is no suggestion that JZ should be allowed to enter the UK without providing the biometric data, he agrees to provide it once he is in Pakistan. Therefore, that aspect of the public interest is fully protected because relevant databases can be checked before he enters the UK.

43. In respect of the argument about the same person not being able to apply twice, I fully accept the generality of Ms Giovanetti's argument but, in my view, it fails to engage with the facts of the particular case. Unlike most applicants for entry clearance, certainly most asylum seekers, JZ is a known and documented individual with a history that is transparent and verifiable. He has been accepted by the Defendant to have been a judge in Afghanistan with an accepted and evidenced history and full documentation. He can be fully authenticated by both Colonel English but also UK citizens who were working in Afghanistan for the UK mission. It is relevant that Colonel English says he was security vetted in his position.

44. Therefore, on the facts of his case I can see no risk that the person who submitted the application for LOTR will not be the same person who attends the biometric centre in Pakistan and, if found to be so entitled, would then be granted entry clearance. There is no risk that JZ would be rejected for LOTR on the present facts and then present himself again in a different guise.

45. In my view the harm to the public interest that is relied upon by the Defendant is one of generality and fails to engage with the specifics of the present case. As such it is a good example of failing to apply the discretion to defer biometrics in a rational manner, taking into account the individual facts of the case.

70. It is relevant in the case of the applicants that they are not proposing to put off providing biometrics until arrival in the United Kingdom but to provide them in Egypt and as such with reference to [42] of *JZ*, the public interest is protected.

71. In *MRS (Biometrics - entry clearance - Article 8)* [2023] UKUT 00085 (IAC) UTJ Lindsley at {21} found that the risk of immigration fraud was reduced in a case involving family connections with a United Kingdom sponsor.

It is easy to see that if refused in principle without biometrics being taken entry clearance applicants with no family connection to the UK, such as students, visitors and business people, might reinvent themselves as different people therefore addressing the refusal reasons with a fake identity and an "improved" application without declaring the past unsuccessful one, and thus deprive the respondent of a way of identifying dishonest applicants. It is not impossible that a family applicant might do the same, although they would then also have to involve a fake new sponsor, as, for instance, an applicant could not plausibly make a new application in a new identity as the spouse of the same sponsor. I find that this is a legitimate aim applicable in the current applications, although

when striking a fair balance with any interference with family life consideration would have to be given to the greater complexity of the fraud needed to take advantage of the lack of biometrics being taken at the start of the entry clearance process, and thus, I find, the probably lesser likelihood of it taking place.

72. No specific public interest concerns have been directed at the applicants and the following matters demonstrate that there is unlikely to be a risk to the United Kingdom's interests. The applicants' identities have been accepted, the security checks were satisfactory, and they have valid passports which will be sent to the VAC in Cairo from the United Kingdom.

73. In addition, while not strictly necessary, the applicants have agreed to provide their biometric information at the VAC in Cairo, that is before entering the United Kingdom. As noted in *MRS*, the risk of immigration fraud is reduced in family reunion cases and in this case four of the applicants are minors. Given the foregoing, I conclude that the weight to be attached to the public interest on these facts is somewhat reduced.

74. A further factor in the applicants' side of the scale is the mental health of A1. The adverse effect of the separation on the mental state of the sponsor is also deserving of weight.

75. After balancing the public interest concerns against the applicants' circumstances there can be only one conclusion, that is that the respondent's refusal to grant biometric excusal or predetermine their applications is a disproportionate interference with their right to respect for their family life.

76. The respondent's failure to arrive at a decision on their applications for entry clearance could have the effect of a permanent interference with their family owing to the dangerous situation in Gaza along with the applicants' particular vulnerabilities.

Ground 2 – Article 3

77. The Article 3 arguments are made solely in respect of A1, in relation to the anguish he experiences due to the separation from his partner and child in light of the serious risks they are exposed to in Gaza. The short point is that the failure to issue substantive decisions amounted to inhuman and degrading treatment owing to the adverse effect on his already poor mental health. Supporting evidence can be found in the A1's witness statement which refers to his response to hearing about the decisions under challenge, reports and correspondence from Freedom from Torture which refers to A1's suicidal intent if A2-6 were unable to join him or were killed.

78. This ground was not developed by way of a skeleton argument or by Ms Kilroy at the hearing. In the absence of any submissions of substance on this matter, it is not arguable that the failure to issue substantive decisions amounted to a breach of A1's Article 3 rights.

Ground 3(i)

79. Criticism is made in the grounds of version 1 of the Unsafe Journey Guidance. The decisions in this case were taken under this policy along with version 9.0 of the Biometric enrolment: policy guidance.

80. During her submissions, Ms Kilroy accepted that there was no reference to a need for extraordinary or unusual circumstances in the Biometric enrolment policy guidance and that it was capable of being lawfully complied with. As for the four criteria at page 12 of the Unsafe Journey Guidance, Ms Kilroy submitted that the applicants met all four and that the decisions unlawfully stated that they did not do so. She conceded that second of the criteria did not impose a requirement of unusual circumstances and that it could be read lawfully. There was no effective challenge to the third of the criteria, in that Ms Kilroy acknowledged that there was no requirement for extraordinary or unusual circumstances here either. It was not argued that the first or fourth of the four criteria were unlawful.

81. Ms Kilroy conceded that the guidance did not impose a higher test as suggested in the grounds and that the test was capable of lawful compliance. Given that it is argued that the applicants' circumstances are sufficiently compelling to justify an exception being made to defer biometric enrolment, it is difficult to see where the criticism of the policy lies. No arguable public law error has been established in relation to the content of version 1 of the Unsafe Journey Guidance. It follows that permission is refused on the basis that there is no arguable point to be made here.

Ground 3 (ii)

82. Version 2 of the Unsafe Journey Guidance while dated 8 February 2024 was not published until 14 February 2024. It was not in force at the time of the decisions under challenge and accordingly did not affect the consideration of the applicants' case. It follows that this ground is not arguable and permission is refused.

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